

1 SHARTSIS FRIESE LLP
2 ROBERT E. SCHABERG (Bar #81430)
3 SIMONE M. KATZ (Bar #246490)
4 One Maritime Plaza, Eighteenth Floor
San Francisco, CA 94111
Telephone: (415) 421-6500
Facsimile: (415) 421-2922
Email: rschaberg@sflaw.com; skatz@sflaw.com

6 Attorneys for Defendants
CorMatrix Cardiovascular, Inc., Robert G. Matheny,
David B. Camp, and Beecher Lewis

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

12 DUKE ADVANTAGE, LLC, a company,
13 Plaintiff

14 v.
15 CORMATRIX CARDIOVASCULAR,
16 INC., a corporation, ROBERT G.
17 MATHENY, an individual, DAVID B.
CAMP, an individual, and BEECHER
LEWIS, an individual.

18 Defendants.

Case No. C072950 RMW
Santa Clara Superior
Court Case No. 107 CV085326

**NOTICE OF MOTION AND MOTION TO
DISMISS THE COMPLAINT FOR
IMPROPER VENUE; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

[Pursuant to F.R.C.P. 12(b)(3)]

Date: August 3, 2007
Time: 9:00 a.m.
Courtroom: 6
Judge: Hon. Ronald M. Whyte

1

TABLE OF CONTENTS

	<u>Page</u>	
1		
2		
3	I. INTRODUCTION	1
4	II. STATEMENT OF FACTS	1
5	A. The Parties.....	1
6	B. The Subscription Agreement	2
7	C. The Complaint.....	3
8	D. Related Proceedings.....	4
9	III. THIS CASE SHOULD BE DISMISSED FOR IMPROPER VENUE PURSUANT	
10	TO RULE 12(B)(3).....	6
11	A. Legal Standard	6
12	B. Venue is Improper in California Based on the Mandatory Forum Selection	
13	Clause in the Subscription Agreement.....	6
14	1. The forum selection clause is mandatory.....	6
15	2. The forum selection clause is presumptively valid.....	7
16	3. The Subscription Agreement applies to the Individual Defendants.....	7
17	4. The forum selection clause applies to both contract and tort claims	8
18	IV. CONCLUSION.....	9
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

SHARTSIS FRIESE LLP
ONE MARITIME PLAZA
EIGHTEENTH FLOOR
SAN FRANCISCO, CA 94111

1 TABLE OF AUTHORITIES
23 CASES
45 Page
6

4 <i>Argueta v. Banco Mexicano, S.A.,</i> 5 87 F.3d 320 (9th Cir. 1996).....	6, 7
6 <i>Docksider, Ltd. v. Sea Technology, Ltd.,</i> 7 875 F.2d 762 (9th Cir. 1989).....	7
7 <i>Manetti-Farrow, Inc. v. Gucci America, Inc.,</i> 8 858 F.2d 509 (9th Cir. 1988).....	6, 8
9 <i>Murphy v. Schneider National, Inc.,</i> 10 362 F.3d 1133 (9th Cir. 2004).....	6

11 FEDERAL STATUTES
12

11 Federal Rule of Civil Procedure 12(b)(3)	1
---	---

13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

SHARTSIS FRIESE LLP
ONE MARITIME PLAZA
EIGHTEENTH FLOOR
SAN FRANCISCO, CA 94111

NOTICE OF MOTION

TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on Friday, August 3, 2007 at 9:00 a.m., or as soon thereafter as the matter may be heard before the Honorable Ronald M. Whyte, Courtroom 6, in the United States District Courthouse located at 280 South 1st Street, San Jose, California, Defendants CorMatrix Cardiovascular, Inc., Robert G. Matheny, David B. Camp and Beecher Lewis will, and hereby do, move to dismiss this action pursuant to Federal Rule of Civil Procedure 12(b)(3) (“Rule 12(b)(3)”) for improper venue.

This motion is based upon this Notice of Motion, the supporting Memorandum of Points and Authorities submitted herewith, the supporting Declarations of David B. Camp and John Thomas submitted concurrently herewith, the pleadings and records on file in this action, all other matters of which the Court may take judicial notice, and such further argument and evidence as may be presented at the hearing on this motion.

SHARTS FRIESE LLP
ONE MARITIME PLAZA
EIGHTEENTH FLOOR
SAN FRANCISCO, CA 94111

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

3 This district is not the proper venue to hear this case. Based on a valid and enforceable
4 forum selection clause in a subscription agreement entered into by Duke Advantage, LLC
5 (“Plaintiff”) and CorMatrix Cardiovascular, Inc. (“CorMatrix”) on February 9, 2004 (the
6 “Subscription Agreement”), Plaintiff may only bring a claim arising out of or relating to the
7 Subscription Agreement and any action against CorMatrix in Georgia State Court or Delaware
8 Federal Court. Because Plaintiff failed to abide by the clear terms of the forum selection clause,
9 this action should be dismissed under Rule 12(b)(3) as to all defendants, including CorMatrix,
10 Robert G. Matheny (“Matheny”), David B. Camp (“Camp”), and Beecher Lewis (“Lewis”)
11 (collectively, Matheny, Camp, and Lewis are referred to as the “Individual Defendants”).

II. STATEMENT OF FACTS

A. The Parties

CorMatrix is a Georgia corporation that maintains its principle place of business at 200 N. Cobb Parkway, Marietta, Cobb County, Georgia 30062. Declaration of David B. Camp in support of Motion to Dismiss (“Decl. of Camp”), ¶ 3. CorMatrix is a tissue engineering and medical device company that is engaged in the business of researching, developing, manufacturing and marketing naturally-occurring extracellular matrix (“ECM”) products for cardiovascular applications. *Id.*

Matheny is the Chief Scientific Officer of CorMatrix, and a member of CorMatrix's board of directors, and is a resident of the State of Georgia. *Id.*, ¶ 4. Camp is the Chief Executive Officer of CorMatrix, and a member of CorMatrix's board of directors, and is a resident of the State of Georgia. *Id.*, ¶ 1. Lewis is the President and Chief Operating Officer of CorMatrix, and a member of CorMatrix's board of directors, and is a resident of the State of Florida. *Id.*, ¶ 5.

Plaintiff is a limited liability company organized and existing under the laws of Delaware. Complaint, ¶ 5. Robert LaDuca (“LaDuca”) is a member of Plaintiff and a resident of the State of California. *Id.*, ¶ 15. LaDuca was elected to CorMatrix’s board of directors and made an officer of CorMatrix, holding the title of Vice President of Operations. Decl. of Camp, ¶ 6.

1 **B. The Subscription Agreement**

2 In late 2003, LaDuca entered into discussions with CorMatrix's founder, Matheny, about
 3 the possibility of LaDuca investing in CorMatrix and participating in the development of future
 4 CorMatrix products. In February 2004, LaDuca made the decision to invest in CorMatrix and
 5 caused a limited liability company controlled by him, Plaintiff, to purchase 25,161 shares in
 6 CorMatrix for a total purchase price of \$350,000. This transaction was memorialized by the
 7 Subscription Agreement. *See* Declaration of John Thomas in support of Motion to Dismiss
 8 ("Decl. of Thomas"), Ex. A at 1, 10. The "Undersigned" under the Subscription Agreement is
 9 Plaintiff and the "Company" is CorMatrix. *Id.*, Ex. A at 1, 10. LaDuca, in his capacity as the
 10 Manager of Plaintiff, signed the Subscription Agreement on behalf of Plaintiff. *Id.*, Ex. A at 10.
 11 John Thomas, in his capacity as Chief Financial Officer of CorMatrix, signed the Subscription
 12 Agreement on behalf of CorMatrix. *Id.*, Ex. A at 10.

13 Section 4.2 of the Subscription Agreement, entitled "Governing Law; Jurisdiction"
 14 provides the following:

15 (A) THIS SUBSCRIPTION AGREEMENT SHALL BE
 16 GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH
 17 THE INTERNAL LAWS OF THE STATE OF GEORGIA
 18 WITHOUT REGARD TO ITS CONFLICT OF LAW
 19 PRINCIPLES,

20 (B) THE UNDERSIGNED HEREBY IRREVOCABLY SUBMITS
 21 TO THE JURISDICTION OF ANY GEORGIA STATE COURT
 22 OR UNITED STATES FEDERAL COURT SITTING IN THE
 23 STATE OF DELAWARE, OVER ANY ACTION OR
 24 PROCEEDING ARISING OUT OF OR RELATING TO THIS
 25 SUBSCRIPTION AGREEMENT OR ANY AGREEMENT
 26 CONTEMPLATED HEREBY, AND

27 (C) THE UNDERSIGNED HEREBY IRREVOCABLY AGREES
 28 THAT ALL CLAIMS IN RESPECT OF SUCH ACTION OR
 29 PROCEEDING SHALL BE HEARD AND DETERMINED IN
 30 SUCH GEORGIA STATE COURT OR FEDERAL COURT. THE
 31 UNDERSIGNED FURTHER WAIVES ANY OBJECTION TO
 32 VENUE IN SUCH COURT AND ANY OBJECTION TO AN
 33 ACTION OR PROCEEDING IN SUCH COURT ON THE BASIS
 34 OF A NON-CONVENIENT FORUM. THE UNDERSIGNED
 35 FURTHER AGREES THAT ANY ACTION OR PROCEEDING
 36 BROUGHT AGAINST THE COMPANY SHALL BE BROUGHT
 37 IN SUCH COURTS.

28 *Id.*, Ex. A § 4.2 (emphasis in original). Thus, under the clear terms of this forum selection clause,

1 Plaintiff agreed to bring *any action arising out of or relating to* the Subscription Agreement and
 2 *any action* against CorMatrix in only two jurisdictions: Georgia State Court or Delaware Federal
 3 Court. Further, Plaintiff agreed to waive any objections to venue in either court based on a non-
 4 convenient forum argument.

5 **C. The Complaint**

6 On May 4, 2007, Plaintiff filed this Complaint not in Georgia State Court or Delaware
 7 Federal Court as required by the Subscription Agreement, but in California State Court. *See*
 8 Complaint at 1. The Complaint alleges causes of action for Breach of Fiduciary Duty, Fraudulent
 9 Inducement, Breach of Contract, Accounting, and Inspection. *Id.* All of these causes of action,
 10 except the Accounting cause of action, are brought against CorMatrix. Further, all of these
 11 causes of action arise out of or relate to the Subscription Agreement because all relate to
 12 Plaintiff's investment of \$350,000 in CorMatrix and Defendants' alleged failure to abide by the
 13 terms of their agreement and protect Plaintiff as a minority shareholder.¹

14 The Complaint is filled with factual allegations relating to Plaintiff's investment in
 15 CorMatrix. *See, e.g., id.*, ¶¶ 1, 2, 3, 16-25, 33 (making such allegations as “[w]ithout some role in
 16 overseeing the company's strategy and operations, Duke Advantage would not have been
 17 comfortable investing \$350,000”; “[t]he Defendants, however, breached their agreement to allow
 18 Duke Advantage an active role in CorMatrix”; “[o]n February 9, 2004, Duke Advantage agreed to
 19 make its investment. Duke Advantage executed the written portion of the parties' agreement, a
 20 stock subscription agreement drawn up by the Defendants”; “[a]fter receiving \$350,000 from
 21 Duke Advantage, however, Defendants failed to live up to the terms of the parties' agreement”;
 22 “LaDuca wanted to see these records in order to assure that Duke Advantage and other

23 ¹ To the extent that Plaintiff attempts to argue that there was an oral contract between the parties
 24 relating to Plaintiff's \$350,000 investment in CorMatrix, Section 4.6 of the Subscription
 Agreement forecloses such possibility. It provides that

25 [t]his Subscription Agreement constitutes the entire understanding
 26 of the parties hereto with respect to the subject matter hereof and no
 27 amendment, restatement, modification or alteration will be binding
 unless the same is in writing signed by the party against whom any
 such amendment, restatement, modification or alteration is sought
 to be enforced.

28 Decl. of Thomas, Ex. A, § 4.6.

1 shareholders were not having their investments improperly diluted"). In fact, the first paragraph
 2 of the Complaint appropriately summarizes the action as follows:

3 This matter involves a breach of contract, breaches of fiduciary
 4 duties, and a false promise made by Defendants in order to induce
 5 the Plaintiff Duke Advantage to make a sizeable investment in their
 6 company. While negotiating for Duke Advantage's \$350,000
 7 investment in Defendant CorMatrix Cardiovascular, Inc.
 8 ("CorMatrix"), CorMatrix's founding executive represented and
 9 ultimately agreed that Duke Advantage would not merely be a
 10 passive investor, but would have a meaningful role in guiding the
 11 company, and its member Robert LaDuca ("LaDuca") would be
 12 given a seat on CorMatrix's board of directors. These promises
 13 were false, and were made with the intention of inducing Duke
 14 Advantage to invest in CorMatrix.

15 Complaint, ¶ 1.

16 Further, each one of the causes of action incorporates by reference all of the allegations
 17 contained in the Compliant and each relates specifically to Plaintiff's investment in and its
 18 position as a minority shareholder of CorMatrix. *See, e.g., id.*, ¶ 38 [Breach of Fiduciary Duty]
 19 ("Defendants may not abuse their positions of power and authority to the detriment of Duke
 20 Advantage as a minority shareholder."); *Id.*, ¶ 46 [Fraudulent Inducement] ("Defendants made
 21 these false promises with the intention that Duke Advantage rely upon them in making its
 22 decision to invest. Duke Advantage did in fact reasonably rely on Defendants' promises in
 23 deciding to invest \$350,000 in CorMatrix."); *Id.*, ¶ 50 [Breach of Contract] ("Duke Advantage
 24 and Defendants entered into a valid and enforceable contract under which Duke Advantage would
 25 provide consideration of \$350,000 to Defendants in exchange for a 20 percent share in CorMatrix
 26"); *Id.*, ¶ 56 [Accounting] ("In addition, through their majority ownership of the stock of
 27 CorMatrix, the Defendants have exercised substantial control over the operations of CorMatrix.");
 28 *Id.*, ¶ 60 [Inspection] ("Defendants are improperly preventing the Plaintiff Duke Advantage from
 29 reviewing the books and records of CorMatrix as it is authorized to do.").

30 **D. Related Proceedings**

31 In the interest of efficiency and full disclosure, CorMatrix and the Individual Defendants
 32 provide the Court with the complaints from related proceedings and the status of these
 33 proceedings:

- 1 • On March 14, 2007, CorMatrix filed its own complaint in Georgia State Court
2 against LaDuca and Duke Vascular, Inc. (“Duke Vascular”) for Misappropriation
3 of Corporate Opportunity, Breach of Fiduciary Duty/Loyalty, Constructive Trust,
4 Theft of Trade Secrets, and Breach of Contract (the “Georgia State Court Action”).
5 *See* Decl. of Camp, Ex. A. Duke Vascular is a Delaware corporation that is
6 controlled by LaDuca. *Id.*, Ex. A, ¶ 3.
- 7 • On April 19, 2007, thirty-six (36) days after CorMatrix filed its own complaint in
8 Georgia State Court, Duke Empirical, Inc. (“Duke Empirical”), Duke Fiduciary,
9 LLC (“Duke Fiduciary”), and Robert Glines filed a complaint in California State
10 Court against CorMatrix, Matheny, Camp and Lewis for Declaratory Relief,
11 Breach of Implied-in-Fact Contract, Common Law Misappropriation and Fraud
12 (the “California State Court Action”). *See* Decl. of Camp, Ex. B. Duke Empirical
13 is a Delaware corporation and Duke Fiduciary is a Nevada corporation of which
14 LaDuca is a member. *Id.*, Ex. B, ¶¶ 1, 2. Both Duke Empirical and Duke
15 Fiduciary are companies owned and controlled by LaDuca.
- 16 • On May 23, 2007, CorMatrix, Matheny and Lewis² filed a demurrer to the causes
17 of action for Breach of Implied-in Fact Contract and Fraud in the California State
18 Court Action.
- 19 • On May 25, 2007, LaDuca and Duke Vascular removed the Georgia State Court
20 Action to the United States District Court for the Northern District of Georgia. On
21 June 4, 2007, LaDuca and Duke Vascular filed a motion to dismiss the complaint
22 for lack of personal jurisdiction or in the alternative to transfer the action to the
23 Northern District of California.³

SHARTSIS FRIESE LLP
ONE MARITIME PLAZA
EIGHTEENTH FLOOR
SAN FRANCISCO, CA 94111

² Camp had not yet been served at the time of the filing of the demurrer. Camp has since been served and intends to join in the demurrer.

³ CorMatrix opposes this motion, in part, because transferring to this Court is in contravention of the Subscription Agreement’s forum selection clause.

1 **III. THIS CASE SHOULD BE DISMISSED FOR IMPROPER VENUE PURSUANT**
 2 **TO RULE 12(b)(3)**

3 **A. Legal Standard**

4 The proper vehicle to enforce a forum selection clause is through a Rule 12(b)(3) motion
 5 for improper venue. *See Argueta v. Banco Mexicano, S.A.*, 87 F.3d 320, 324 (9th Cir. 1996)
 6 (“We have not yet identified which procedural rule governs a motion to dismiss premised on the
 7 enforcement of a forum selection clause. . . . We conclude we should treat [the defendant]’s
 8 motion as a Rule 12(b)(3) motion to dismiss for improper venue.”). In diversity cases, federal
 9 law governs the validity of forum selection clauses. *Manetti-Farrow, Inc. v. Gucci America, Inc.*,
 10 858 F.2d 509, 513 (9th Cir. 1988). When a party brings a motion to dismiss for improper venue
 11 under Rule 12(b)(3), “the pleadings need not be accepted as true, . . . and the court may consider
 12 facts outside of the pleadings.” *Murphy v. Schneider Nat’l, Inc.*, 362 F.3d 1133, 1137 (9th Cir.
 13 2004) (citations omitted). Accordingly, it is appropriate for this Court to consider the supporting
 14 declarations submitted concurrently herewith. *See* Decl. of Camp, Decl. of Thomas.

15 A forum selection clause is “prima facie valid and should not be set aside unless the party
 16 challenging enforcement of such a provision can show it is ‘unreasonable under the
 17 circumstances.’” *Argueta*, 87 F.3d at 325 (quoting *The Bremen v. Zapata Off-Shore Co.*, 407
 18 U.S. 1, 10 (1972)). “The Supreme Court has construed this exception narrowly.” *Id.* To
 19 establish the unreasonableness of a forum selection clause, the plaintiff has the “‘heavy burden of
 20 showing that trial in the chosen forum would be so difficult and inconvenient that the party would
 21 effectively be denied a meaningful day in court.’” *Id.* (quoting *Pelleport Investors, Inc. v. Budco*
 22 *Quality Theatres, Inc.*, 741 F.2d 273, 281 (9th Cir. 1984)).

23 **B. Venue is Improper in California Based on the Mandatory Forum Selection**
 24 **Clause in the Subscription Agreement**

25 **1. The forum selection clause is mandatory**

26 As provided above, the forum selection clause in the Subscription Agreement precludes
 27 Plaintiff from filing a complaint relating to its \$350,000 investment in CorMatrix in any
 28 jurisdiction, except Georgia State Court or Delaware Federal Court. The forum selection clause

1 further provides that Plaintiff “irrevocably agrees that *all* claims in respect of such action or
 2 proceeding shall be heard and determined in such Georgia State or Federal Court,” that Plaintiff
 3 expressly waives any objection to venue in either court, and that “*any* action” against CorMatrix
 4 “shall be brought in such courts.” Decl. of Thomas, Ex. A, § 4.2 (emphasis added). Accordingly,
 5 the language of the forum selection clause is mandatory because it speaks in terms of both
 6 jurisdiction and venue and provides that “all claims” arising out of or relating to the Subscription
 7 Agreement and “any action” against CorMatrix “shall” be heard and determined in only the two
 8 specified jurisdictions. *See Docksider, Ltd. v. Sea Technology, Ltd.*, 875 F.2d 762, 763 (9th Cir.
 9 1989) (finding the forum selection clause language mandatory; the agreement provided that “This
 10 agreement shall be deemed to be a contract made under the laws of the State of Virginia, United
 11 States of America, and for all purposes shall be interpreted in its entirety in accordance with the
 12 laws of said State. Licensee hereby agrees and consents to the jurisdiction of the courts of the
 13 State of Virginia. Venue of any action brought hereunder shall be deemed to be in Gloucester
 14 County, Virginia.”).

15 **2. The forum selection clause is presumptively valid**

16 Under governing Ninth Circuit authority, the forum selection clause is presumptively
 17 valid and it is Plaintiff’s heavy burden to show why the clause is unreasonable. *Argueta*, 87 F.3d
 18 at 325. Plaintiff has provided no grounds in its Complaint for why this Court should not enforce
 19 the forum selection clause. Moreover, Plaintiff cannot rebut the presumption of validity of the
 20 forum selection clause or overcome its heavy burden of showing that the clause is unreasonable.
 21 *Id.* Further, there are no facts at Plaintiff’s disposal which might even remotely suggest that
 22 Plaintiff will be denied its day in court in either of the jurisdictions specified in the forum
 23 selection clause.

24 **3. The Subscription Agreement applies to the Individual Defendants**

25 Plaintiff may attempt to argue that the forum selection clause can only apply to
 26 CorMatrix, which was the only defendant to sign the contract. However, the Ninth Circuit has
 27 considered the issue and determined that where “the alleged conduct of the non-parties is so
 28 closely related to the contractual relationship . . . the forum selection clause applies to all

1 defendants.” *Manetti-Farrow*, 858 F.2d at 514 n.5 (determining that all defendants including the
 2 officers and directors sued by the plaintiff benefit from the forum selection clause signed by the
 3 corporation). “A range of transaction participants, parties and non-parties, should benefit from
 4 and be subject to forum selection clauses.” *Manetti-Farrow*, 858 F.2d at 514 n.5 (quoting
 5 *Clinton v. Janger*, 583 F. Supp. 284, 290 (N.D. Ill. 1984)).

6 Here, the alleged conduct of the Individual Defendants is closely tied to the contractual
 7 relationship between Plaintiff and CorMatrix. Plaintiff accuses the Individual Defendants of
 8 being “individually liable for CorMatrix’s wrongful acts” because they allegedly exercised
 9 “effective control and dominance over CorMatrix’s activities” and “used CorMatrix to perpetrate
 10 the actions complained of herein.” Complaint, ¶ 10. The Complaint details the negotiations that
 11 LaDuka and Matheny allegedly had, leading up to the execution of the Subscription Agreement.
 12 *See, e.g., id.*, ¶ 16 (LaDuka had a meeting with Matheny “to discuss issues including the
 13 possibility of using ECM in conjunction with stent grafts.”); *Id.*, ¶ 18 (In February 2004, “LaDuka
 14 and Matheny began discussing the possibility of LaDuka investing in CorMatrix.”); *Id.*, ¶ 19
 15 (alleging that “Matheny and LaDuka agreed that were Duke Advantage to invest, it would play an
 16 active role in CorMatrix”); *Id.*, ¶ 20 (alleging that “LaDuka definitively told Matheny that
 17 Duke Advantage would require an active role in the company and board representation if it were
 18 going to invest a sum as large as \$350,000.”). Further, the Complaint accuses all Defendants of
 19 failing to live up to the Subscription Agreement. *See, e.g., id.*, ¶ 22 (“In fact, Defendants had no
 20 intention of following through on these promises and agreements, and made them with the intent
 21 of inducing Duke Advantage to invest. Despite this lack of intention, Defendants nevertheless
 22 agreed to these terms, creating a legally binding contract between the parties.”); *Id.*, ¶ 36 (“Duke
 23 Advantage has been harmed by the Defendants’ actions by virtue of the fact that it bargained for
 24 and was induced into investing \$350,000 with the promise that it would be granted a board seat
 25 and an active role in CorMatrix that enabled it to monitor and safeguard its investment”).

26 **4. The forum selection clause applies to both contract and tort claims**

27 While the Complaint includes both contract and tort claims, resolution of these claims
 28 mandates interpretation of the Subscription Agreement. *See Manetti-Farrow*, 858 F.2d at 514

1 ("We first note that forum selection clauses can be equally applicable to contractual and tort
2 causes of action. . . . Whether a forum selection clause applies to tort claims depends on whether
3 resolution of the claims relates to interpretation of the contract.") (internal citations omitted).
4 Because all of Plaintiff's claims are intertwined with its investment in CorMatrix, the Court will
5 have to interpret and analyze the Subscription Agreement to determine whether the causes of
6 action are applicable to any of the defendants. At the heart of the case is Plaintiff's \$350,000
7 investment in CorMatrix -- which directly arises out of the Subscription Agreement. Thus, the
8 forum selection clause must be enforced as to all of Plaintiff's claims.

9 **IV. CONCLUSION**

10 For the foregoing reasons, the Complaint should be dismissed for improper venue as to all
11 defendants.

12 DATED: June 13, 2007

SHARTSIS FRIESE LLP

14 By: /s/ Robert E. Schaberg

15 ROBERT E. SCHABERG

16 Attorneys for Defendants
17 CORMATRIX CARDIOVASCULAR, INC.,
ROBERT G. MATHENY, DAVID B. CAMP,
AND BEECHER LEWIS

18 7469\002\SKATZ\1440118.4

19

20

21

22

23

24

25

26

27

28